

effectively terminated by the notice given by the defendants to her in September 1977. These issues can only be decided by a court after evidence has been adduced.

Apart from the above issues, counsel for the applicant/plaintiff also referred to sections 206(1)(a), 206(2), 213(1), 213(1)(b), 213(2), 215(1), 215(3), 215(3)(b), 216(1)(a) and (b), 216(2) and 227(2) of the National Land Code and contended that the plaintiff's tenancy did not cease when Tengku Aminah transferred the land to the defendants who took it subject to the plaintiff's tenancy which was granted by Tengku Aminah. Without considering this argument of counsel, and even if it was accepted as correct, yet it was conceded by counsel for the applicant/plaintiff that it is still a disputed fact whether the land and building in question are controlled premises under the Control of Rent Act, 1966. Although counsel for the applicant/plaintiff has contended that the notice given by the defendants before they had any interest in the said land was not a valid notice to determine the tenancy, yet in my opinion it was still an issue to be decided by the court after hearing arguments on the law as to whether the plaintiff's tenancy had been effectively terminated. Here I would respectfully agree with the following dictum of Wylie C.J. (Borneo) in the case of *Thomas v. Booty, Edwards & Partners*⁽⁶⁾ when His Lordship said:—

"Moreover it is a waste of time to shut out a defence, because immediately judgment was given in default the defendant would apply to set it aside. An order would be granted if there is a defence and the defendant had (not), in effect, been refused an opportunity for the court to hear his side of the case. We are concerned only with the application of rules of procedure. These applications should not amount to a denial of the principles of justice. It is for these reasons that extensions of time are usually granted as a matter of course unless there are very strong circumstances to show that these are delaying tactics of some major feature. . . ."

Having considered all the circumstances of this case I therefore decided, in exercise of the powers under Order 12 rule 22 of the Rules of the Supreme Court, 1957, to make an order to allow the defendants one week from the date of the said order to file their statement of defence on payment of costs thrown away. The said order was made on the defendants' application by way of summons-in-chambers dated March 2, 1978. I made no order on the applicant/plaintiff's notice of motion, except at the request of her counsel, I ordered that costs connected with the said notice of motion be paid by the defendants to the plaintiff in any event.

Order accordingly.

Solicitors: *Jayadeva & Kamal; Ajmeer Singh Sandhu & Co.*

MAT DESA BIN SALLEH v. ANG HOCK LEE & ANOR.

[O.C.J. (Syed Agil Barakbah J.) April 29, 1978]
[Alor Star — Civil Suit No. 26 of 1975]

Damages — Quantum — Leg injuries — 1" shortening — General damages awarded \$28,000.00.

The plaintiff, a private in the Malaysian Army, claimed damages against the defendants for injuries sustained by him, due to a motor accident involving the second defendant's taxi (driven by the first defendant) and the plaintiff's motorcycle.

The plaintiff suffered the following injuries:— (1) Laceration on right leg and foot; (2) fracture of the right fibula above which was a lacerated wound 3" x 2" on lower third with about 2" of the bone protruding out of the wound; (3) Compound comminuted fracture on mid shaft of right tibia and (4) fracture of lateral condyle of right tibia. There was also 1" shortening of his right leg. At the time of the accident, the plaintiff received a monthly salary of \$420 and a housing allowance of \$64.00.

Held: the defendants were solely liable for negligence. The plaintiff was therefore awarded \$28,000 general damages (being \$18,000 for pain and \$10,000 as probable loss of future earnings) and \$1,300 as agreed for special damages.

Cases referred to:—

- (1) *Foong Nan v. Sagadevan* [1971] 2 M.L.J. 24.
- (2) *Rahmat bin Shwall v. Basheer Ahmad & Anor.* [1977] 1 M.L.J. lxxx.
- (3) *Chua Thye Peng v. Yeo Soo Hwee* [1967] 1 M.L.J. lxi.

E CIVIL SUIT

Baldev Singh Bhar for the plaintiff.

Peh Swee Chin for the defendants.

Cur. Adv. Vult.

Syed Agil Barakbah J.: This is a claim for damages by the plaintiff, a private attached to the 8th Royal Malay Regiment, Terendak Camp, Melaka for damages due to injuries sustained by him as a result of a motor accident at or near the 40th milestone, Sungai Patani/Butterworth road on April 1, 1973 at about 9.30 p.m. He was riding a motor-cycle BJ 7275 from the direction of Sg. Patani towards Tikam Batu. The 1st defendant was driving a Mercedes-190 taxi as servant or agent of the 2nd defendant, from the opposite direction proceeding towards Sg. Patani. An accident took place between the two vehicles somewhere near a left hand bend as one travels in the same direction as the plaintiff. At the time of the accident, the area was dark, there being no street lights, the weather was fine and the road was dry. The plaintiff alleges the accident occurred due to the negligent driving of the 1st defendant. Particulars of the alleged negligence are provided at paragraph 4 of the Statement of Claim.

The defendants, on the other hand, deny such negligence and aver that it was caused entirely and/or contributed to by the negligence of the plaintiff.

Mr. Baldev Singh appeared for the plaintiff and Mr. Peh Swee Chin, for both defendants. The Agreed and Further Agreed Bundles of Documents are produced and marked Exhibits A, A1 and A2 and the Agreed Statement of Facts is marked Exhibit B.

At the commencement of the proceeding, both counsel agreed to the claim for special damages in the

sum of \$1,300, subject to proof of liability. During the proceeding, it was conceded that near the scene of the accident there is a double bend and the actual scene is the first bend nearer to Tikam Batu side as shown in the sketch plan (page 5 of Exhibit A).

According to the plaintiff, he was riding his motor-cycle on his way home from Sg. Patani to Tikam Batu, travelling about one foot or so from his left side of the road at about 20 m.p.h. The headlight of his motor-cycle was on. While nearing the bend from about 30 yards or so in front, he saw the lights of an oncoming motor-car. After negotiating the bend, the car came towards his direction. He immediately swerved to his left to avoid the oncoming vehicle, but the front off-side of the car knocked against the centre part of the off-side of his motor-cycle. As a result, he was thrown off to the left side-table and the motor-cycle fell near him on the same side. The collision, according to the plaintiff, took place on his side of the road, about one foot or so away from the left edge of the metalled part. He noticed the defendant's car stop about one telephone post away, but subsequently proceeded on. A passing vehicle took him to the District Hospital, Sg. Patani, where he was admitted. Later he was transferred to the General Hospital, Alor Star.

In his evidence, the 1st defendant stated he was driving his motor taxi on his correct side of the road with the headlights on and was going at about 30 m.p.h. When the accident took place, his taxi was still on the left side of the road. He did not see any lights from the oncoming motor-cycle. Then the front off-side mud-guard of his taxi collided with the motor-cycle. The accident took place at the centre of the road when both vehicles were passing each other. He was, however, not sure of the exact place of the accident. At first he said the accident between the two vehicles took place at a bend, but subsequently changed his version and said it took place after passing the bend on a straight stretch of road. He also admitted that because the bend was a right hand bend, the lights of the car shone straight on to the left side of the road and he could not see the motor-cycle coming from the right front side. In cross-examination, he agreed only after hearing a bang he realised his car had collided with something. That is the same version he has given in his Police Report (pages 1 & 2 of Exhibit A). He also agreed as the place was dark, with neither street lights nor moon light, there would be no visibility without the lights of the car and further without any light, no vehicle could travel at all on the road that night.

I am unable to accept the 1st defendant's version that the plaintiff's motor-cycle had no lights on at the material time. According to the plaintiff, the bike was an old Honda 75 c.c. model which he bought second-hand about a year prior to the accident. He agreed the head-light was not as bright as that of a new motor-cycle. He was sure the light did not fail on the journey just prior to the accident. I cannot accept in the circumstances that the plaintiff was able to proceed along the road without any light at all from his motor-cycle. Had the 1st defendant paid proper attention and driven with care, he would have seen the motor-cycle light from the opposite direction.

The vital question is where was the point of impact. Taking into consideration all the relevant facts and surrounding circumstances, including documentary evidence, I hold that the point of impact is not at point X. It is improbable that the glass fragments from the defendant's car could fall sideways immediately on impact and at almost the same spot since the motor-car did not stop but proceeded on and came to a brief stop a distance away. That version is not supported by the 1st defendant's own evidence, not to mention the plaintiff's. In the circumstances, the glass fragments would be carried forward by the heavier moving vehicle for some distance from the point of impact before they dropped on the road upon the vehicle coming to a stop. (See Ong C.J. (as he then was) in *Foong Nan v. Sagadevan*⁽¹⁾ at page 25, left hand column, paragraph I).

On the other hand, the plaintiff's version is substantiated by the damage to both vehicles and the sketch plan and the nature of the injuries suffered, well indicating that the impact took place when both vehicles were at an angle, viz. the plaintiff's motor-cycle proceeding more towards the left in order to avoid the motor-car and the off-side front portion of the car coming into contact with the off-side of the motor-cycle with an angular rather than a full impact. In my considered judgment, the inevitable inference even from the 1st defendant's own account of the accident is that the point of impact is probably somewhere at the peak of the bend near the third point E as marked in the sketch plan beyond the centre line and within the plaintiff's side of the road. For the same reason, I also cannot accept the version that the plaintiff was riding at a fast speed and had proceeded about 85 ft. from the point of impact. There is no iota of evidence that the plaintiff has contributed to such negligence. I therefore hold the 1st defendant solely liable for negligence.

Quantum of damages.

The plaintiff suffered serious injuries to his right leg. According to medical reports, he suffered the following:—

1. Lacerations on right leg and foot. On admission to Sg. Petani Hospital on day of accident, there was a 6" x 4" laceration on the leg anteriorly with bone exposed at upper 1/3, and knee with abrasions medial to it.
2. Fracture of the right fibula above which was a lacerated wound 3" x 2" on lower third with about 2" of the bone protruding out of the wound.
3. Compound comminuted fracture on mid shaft of right tibia. There was a lacerated wound 1/4" medially on the upper third.
4. Fracture of lateral condyle of right tibia.

He had to undergo operations on four separate occasions. His wounds earlier became septic and began to discharge pus. A nail had to be passed through the fractured shaft of the right tibia. An abscess developed in the inter-muscular plane of the right thigh which was drained and healed in the course of time. Later an operation for plastic surgery from the skin flaps was done to cover the exposed shin bone. (See medical reports

on pages 8 & 9 and page 13 of Exhibit A). During the proceeding, I noticed there was still a huge and ugly scar on the shin which has grown out of shape and smaller than its normal size. When the plaintiff was examined by Dr. Bell on December 26, 1974, he could not walk without crutches or bear weight on the right foot. Unhealed areas on the right shin were still discharging pus. The fracture of mid shaft tibia was still not united with several degrees of angular movement at the fracture site. The right knee joint and ankle were still swollen. There was a measured shortening of a little more than $\frac{1}{2}$ " of the right leg. On January 7, 1975, he was examined again by the Military Surgical Registrar (page 14 of Exhibit A). His injuries were still not completely healed; he was still indisposed and was advised for regular check-up. The last medical report by the Military Consultant Surgeon, who examined the plaintiff on August 10, 1976 (Exhibit A1), shows the patient has a 1 inch shortening of the affected right lower limb and was able to walk with the aid of a walking stick. X-rays showed that the tibia had not abridged across the fracture, but there was compensatory thickening of the fibula. He was recommended to be employed in sedentary occupation in his unit. It is noted that there is a difference in the two medical reports stated above regarding the shortening of the plaintiff's right leg. Having regard to the time factor and the condition of the injuries during the separate times when the plaintiff was examined by the medical specialists, I am inclined to accept in the circumstances the shortening of 1 inch instead of slightly more than $\frac{1}{2}$ inch. The plaintiff was admitted to General Hospital, Alor Star on April 2, 1973 for treatment. He was still in hospital when referred to Dr. Bell on December 26, 1974 until March 15, 1974, when he was referred to the Military Hospital during which time he was ward on four separate occasions until October 10, 1974, after which he had attended regular check-ups. (See pages 8, 13 & 14 of Exhibit A).

Considering the facts and circumstances stated above, it is clear that the plaintiff suffered serious injuries and had undergone much pain and suffering during the period. For the purpose of assessing general damages, both learned counsel have referred to a number of cases for the purpose of comparison to enable this court to award a fair and reasonable compensation. Among the cases that bear quite a reasonable measure of similarity with the present case is *Rahmat bin Shwall v. Basheer Ahmad & Anor.*⁽²⁾ in which a sum of \$15,000 was awarded for injuries sustained resulting in 1" shortening of the left leg. The injuries in the present case are more serious. Another similar case is *Chua Thye Peng v. Yeo Soo Hwee*,⁽³⁾ involving a 24-year-old male earning approximately \$154 p.m. and provided with board, lodging and food valued at \$40. Again the injuries suffered resulting in 1" shortening of the right leg, is less serious than the present case and a similar sum of \$15,000 was awarded for pain and suffering and loss of amenities. Bearing in mind the risk of overlapping and also the increase in the present cost of living, I award the sum of \$18,000 for pain and suffering and loss of amenities, which I think is fair and reasonable.

As regards loss of future earnings, the plaintiff did not lose his job, but remained as a private and

A was receiving the same monthly salary of \$420 and a housing allowance of \$64. He was detailed to do light duty because of the injuries. He was employed on contract from May 18, 1963 and his service would terminate on May 18, 1978 after 15 years. According to the Major in charge of keeping the records of service of military personnel of the Regiment (PW1), the plaintiff's maximum salary as a private is \$480 p.m. The plaintiff had made an application for renewal of his contract for another six years, but the application has not been considered by the Ministry of Defence, probably due to his incapacity. In this regard, since he has a good record of service, there is reasonable and probable ground to conclude that had it not been for the injuries suffered the plaintiff would have been considered for such extension of service. He had thereby been deprived of six years' service on full pay and housing allowance that he is now earning. He would stand to lose the sum of \$30,240 for the duration of 6 years. As a private in the Infantry, the plaintiff has not received any training in the technical line either in the course of his duties or prior to retirement in order to prepare for civil life as accorded by the Military. His incapacity due to the injuries does not therefore make any difference because he has not been deprived of any future earnings in that capacity. As regards loss of promotion, I am unable to accept PW1's testimony that the plaintiff has lost the opportunity of promotion to a Sergeant had he been physically fit in the light of his good record, conduct and discipline and the expansion of the Armed Services. There was no evidence that he had attended specialised courses which, according to PW1, is also a factor for consideration for promotion. He had done 10 out of 15 years when the accident occurred and was not even promoted to a Lance Corporal. PW1 agreed that step by step promotion to Corporal and Sergeant is still being adopted. In the circumstances, the plaintiff would have a chance for promotion to a Lance Corporal, if not for the injuries suffered. However, I think that is too remote. It would be different if, prior to the accident, he was being considered for promotion which had to be rejected because of his incapacity or if there is an automatic promotion to a Lance Corporal by virtue of so many years of service. In the circumstances, promotion may be possible, but not in the least probable.

From the nature of the injuries, I think there is every probability that the plaintiff would be able to earn a living after his contract terminates by getting employment to do light work as he has been doing while in military service after the injury or by running a small business of a sundry shop. I would estimate his probable future earnings as about \$150 per month for the duration of say, 10 years. Secondly, he should be entitled to either a pension and/or gratuity on retirement or otherwise to the Employees Provident Fund which will bring in some income. These amounts of probable future earnings will have to be deducted from the sum of \$30,240, being probable loss of earnings as a soldier. However, the actual sum, particularly the second as stated above, cannot be ascertained. I would, in the circumstances, deduct the amount of \$20,000, thus leaving the sum of \$10,000 which should be fair and reasonable under this head.

I therefore give judgment for the plaintiff:—

1. (i) the sum of \$18,000.00 for pain and suffering and loss of amenities;
- (ii) the sum of \$10,000.00 as probable loss of future earnings;

General damages: \$28,000.00.

2. The sum of \$1,300, as agreed for special damages.
3. Interest at the accepted rates for 1(i) and 2 above.
4. Costs.

Order accordingly.

Solicitors: *Triptipal Singh & Co.; Peh Swee Chin & Co.*

ABDUL HAMID v. OOI TEIK EAN & ANOR.

[O.C.J. (Syed Agil Barakbah J.) June 3, 1978]

[Alor Star — Civil Suit No. 303 of 1975]

Damages — Compound fracture of the right leg, 1/4" shortening and abrasion on the face — Liability admitted — Quantum in dispute — Interest on general damages.

The plaintiff, a 42 year old padi planter and owner of a piece of paid land, was injured as a result of an accident involving the scooter on which he was a pillion rider and a motor lorry driven by the first defendant. The second defendant was the owner of the said lorry. The plaintiff sustained compound fracture of the right leg, 1/4 inch shortening and abrasion on the face. X-ray revealed that there was comminuted fracture in the mid-shaft of the right tibia and fibula.

Held: (1) the plaintiff was awarded a total sum of \$18,000 as general damages: \$10,000 for pain and suffering, including 1/4 inch shortening of the right leg, \$3,000 for loss of amenities and \$5,000 for loss of future earnings;

(2) no interest on general damages for pain and suffering was awarded. However, interest on special damages at 3% was awarded from the date of the accident until the date of trial.

Cases referred to:-

- (1) *Marcroft v. Scruttons* [1954] 1 Lloyd's L.R. 395.
- (2) *McAuley v. London Transport Executive* [1957] 2 Lloyd's L.R. 500, 505.
- (3) *Jefford & Anor. v. Gee* [1970] 1 All E.R. 1202.
- (4) *Cookson v. Knowles* [1977] 2 All E.R. 820.

CIVIL SUIT.

Oo Gin Sun for the plaintiff.

N.T. Vello for the defendants.

Cur. Adv. Vult.

Syed Agil Barakbah J.: The plaintiff's claim against the defendants is for damages due to injuries received as a result of a motor accident which took place on the 21st day of December, 1976 at about 1.30 p.m. along the 19 milestone Alor Star/Sg. Patani road. The plaintiff was a pillion rider on a motor scooter No. KC 5868 whilst the 1st defendant was the driver of motor lorry No. KC 874. The 2nd defendant was the registered owner of the said lorry. The 1st defendant knocked down the motor-cyclist who was travelling on the correct side of the road.

Both the defendants admitted liability for negligence. The issue before the court was on the quantum

A of damages. The special damages agreed upon was \$500 and the costs as agreed upon was \$1,500.

Mr. Oo Gin Sun appeared for the plaintiff and Mr. Vello for the defendants. The Agreed Bundle of Documents and the Statement of Agreed Facts were put in and marked as Exhibit "A" and Exhibit "B", respectively.

B The plaintiff, now 45 years old, was a padi planter owning about 10 relongs of padi land for which he pays \$1,500 annual rental to the Zakat Department. On admission to the hospital after the accident, he was examined by the Medical Officer, General Hospital, Alor Star, who found the following injuries:—

1. Compound fracture of the right leg.
2. Abrasion on the face.

X-ray showed there was comminuted fracture in the mid shaft of the right tibia and fibula. His right leg was put in plaster and he was discharged (no date of discharge shown).

D On April 9, 1975, he was examined by Dr. A.L.W. Bell, whose report (p.10 of Exhibit A) shows that the plaster cast from the leg has been removed, a skin grafting operation was performed for an unhealed wound in front of the right ankle and the patient thereafter was having treatment by a "bomoh". He walked with the aid of two crutches. According to Dr. Bell, the fracture of the right tibia and fibula in the lower third still remains disunited, with several degrees of angular movement of the fracture site. There appeared to be about 1/4" shortening of the leg which lies in satisfactory alignment. Movements of the right knee are normal, but of the right ankle slightly restricted, with moderate swelling of the leg and ankle. The skin grafting over the front of the ankle had soundly healed and not adherent to deeper structures. He concluded that the plaintiff was unable to put any weight on the right foot because of the non-union of the broken bones. He suggested further specialist advice should be sought with a view to possible bone grafting, on the ground that an operation, if successful, would result in a strong and stable right leg with very little permanent disability.

G On July 3, 1975, the plaintiff was further seen by Dr. Lim Joo Hai, M.B.B.S. (Sydney), a general practitioner in Alor Star (PW1). While in the witness box when examining the plaintiff's right leg on request, the doctor said that the condition of the leg had become worse and angulated since he examined the plaintiff on the previous occasion. Formerly he found the alignment of his leg was straight, but now angulated posteriorly by more than 45°, and the bones are still not united. He also observed that the plaintiff's leg was shortened by 1", but admitted in cross-examination that between the time of Dr. Bell's examination and the date of his examination of the plaintiff, the leg could have further shortened from 1/4" to 1". He was also of the opinion that had the plaintiff followed Dr. Bell's advice for further surgical treatment or had undergone such treatment after his examination in July 1975, the condition of the plaintiff's right leg would have improved, and there would have been no such shortening or other defects as at present. He was further of the opinion that treatment by bone